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No. 87-855

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF FAYETTEVILLE, NORTH CAROLINA,
Petitioner

v.

HENRY Z. SPELL,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF

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REPLY BRIEF

Although a substantial portion of Respondent's arguments are directed to matters unrelated to the grant of certiorari, the Brief in Opposition does raise matters which warrant a response.

JURY INSTRUCTIONS AND RULE 51

In keeping with an argument endemic in *Monell* litigation, *Kibbe v. City of Springfield*, 107 S.Ct. 662 (1986); *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 255-57 (1981), Respondent contends that all issues (save for that relating to *Brandon v. Holt* and the naming of supervisory defendants as policymakers) are nonreviewable because of an alleged failure to comply with Rule 51. The lower court considered these same arguments and concluded that, on balance, the record warranted full review. There are also a number of additional reasons to support the conclusion that Rule 51 plays no role in this case.

Many of Respondent's arguments that Petitioner waived its right to review the trial court's instruction are not supported by the record.[1] Respondent is correct, however, in pointing out that a portion of the charge at one time was contained in proposed instructions submitted by the Petitioner. One example relates to the granting of damages for violations of constitutional rights.[2] At the time of trial, however, Fourth Circuit precedent mandated its inclusion. This Court's subsequent decision in *Stachura* overruled that precedent. It now represents a clear misapplication of existing law and constitutes "plain error" requiring reversal without reference to Rule 51. *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981) (" 'Plain error' review under

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[1] For instance, Petitioner's proposed jury instructions clearly set forth the policy requirement in *Adickes* terms, *i.e.*, a "persistent, widespread practice . . . so common and well-settled as to constitute a custom." See 5A, J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE Par. 51.01, p. 51-28 ("it is not important in what form an objection is made . . . as long as it is clear that the trial judge understood the party's position.")

[2] As made clear in the Petition, however, counsel for Officer McDaniel, who is also a party before this Court, Rule 19.6, did object to this portion of the charge. Petition for Certiorari 12. Similar arguments are made with respect to the "proximate cause"/ "tacit encouragement" segment. Contrary to Respondent's contention, Brief in Opposition 18-22, and as made clear in the Petition, "tacit encouragement" was used in *two* contexts. One related to the "moving force" behind a constitutional violation. Petition for Certiorari 10-11. Moreover, although Petitioner did incorporate a proximate cause segment in its proposed instructions, following the trial this Court decided two cases undermining negligence liability in section 1983 litigation. *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986). See also *Taylor By and Through Walker v. Ledbetter*, 818 F.2d 791, 812 n.8 (11th Cir. 1987) (dissenting opinion) (" 'affirmative link' between the alleged deprivation and the action or inaction of state officials . . . more stringent than, for example, the proximate cause requirement of tort law."); *Dunster v. Dade County*, 791 F.2d 1516 (11th Cir. 1986), *cert. denied*, 56 U.S.L.W. 3320 (Nov. 3, 1987) (municipal liability based on negligence reversed; intervening decisions in *Daniels* and *Davidson* held to be controlling).

Rule 51 is suited to correcting obvious instances of injustice and misapplied law.")[3]

Finally, this case raises serious, important and unresolved issues with respect to section 1983, the "contours [of which] are currently in a state of evolving definition and uncertainty." *Id.* As with the issue of municipal liability with respect to punitive damages, "the very novelty of the legal issues [presented to this Court and the court below] counsels unrestricted review."

> In addition to being novel, [these questions are] important and appear . . . likely to recur in § 1983 litigation against municipalities. And here the question[s were] squarely presented [below.] [*Id.*]

COLLATERAL ISSUES

Petitioner concedes that there was evidence from which a properly-instructed jury could find that prior to June 1, 1983, Chief Dixon was a policymaker. If the Spell incident occurred prior to that date and if Respondent had proved that the assault in question came about as a direct result of Chief Dixon's alleged explicit or implicit

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[3] It is well settled that on direct review an appellate court must apply the law in effect at the time it renders its decision unless it would cause manifest injustice. *Bradley v. School Bd.*, 416 U.S. 696, 716 (1974). Since the very purpose of Rule 51 is to alert the trial judge of *errors* in the charge so they can be corrected before the jury retires, the policies behind the Rule are not served by applying the Rule to preclude review when precedent intervenes between the time of trial and appeal. *Hegger v. Green*, 646 F.2d 22, 26-7 (2d Cir. 1981). See also *General Beverage Sales Co. v. East-Side Winery*, 568 F.2d 1147, 1152 (7th Cir. 1978) (counsel should not be faulted under Rule 51 for failing to predict changes in the law subsequent to the time a case is appealed); *Williams v. Butler*, 746 F.2d 431, 443-44 (8th Cir. 1984), *aff'd*, 762 F.2d 73 (1985), *vacated and remanded on other grounds sub nom., City of Little Rock v. Williams*, 106 S.Ct. 1508 (1986), *aff'd*, 802 F.2d 296 (8th Cir. 1986), *pet'n for cert. filed*, 56 U.S.L.W. 3048 (July 28, 1987) (error, as a matter of law, to instruct jury on municipal liability for punitive damages; *Fact Concerts* decided after appeal taken). *Contra, Barnett v. Housing Auth.*, 707 F.2d 1571, 1581 (11th Cir. 1983).

encouragement to cover up instances of police brutality, municipal liability would be proper. The incident, however, occurred in November of 1983, almost six months after City Manager Smith took over the Department. Regardless of Respondent's assertions to the contrary, there is sufficient evidence in the record to support a legal and factual conclusion that after June 1, and at the time of the incident, City Manager Smith—not Chief Dixon—possessed and exercised final policymaking authority over the Department.[4]

Petitioner does not concede that there was a proper determination of the existence of a specific "policy" or "policies" which, pursuant to *Adickes*, warranted the imposition of municipal liability. See Brief in Opposition 13 n.27. Specifically, Petitioner contends that under the instruction given, the jury could not properly determine the existence of a policy or custom for at least three reasons. First, in contrast to *Adickes*, policy was defined as something less than an "overly widespread or unduly prolonged pattern of . . . misconduct." Second, although there were introduced into evidence various examples of *de facto* behavior, *e.g.*, inadequate investigations, use of excessive force, the instructions failed to require the jury to draw a nexus between one or more and a properly designated policymaker as the "moving force" behind McDaniel's assault. Third, although Respondent introduced into evidence a catalog of disquieting events which occurred under the regime of Chief Dixon, there is a question as to whether or not they presented a pervasive pattern falling within the *Adickes* definition[5]

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[4] *Cf., Williams v. Butler*, 802 F.2d 296 (8th Cir. 1986), *pet'n for cert. filed*, 56 U.S.L.W. 3048 (U.S. July 7, 1987) (presenting issue as to whether city official was delegated final policy-making authority for purposes of *Monell*).

[5] *Cf., Carter v. District of Columbia*, 795 F.2d 116, 123 (D.C. Cir. 1986) (noting that the cumulative pattern of misbehavior sufficient to reach the *Adickes* definition for "pervasive" remains unquantified).

after City Manager Smith assumed control on June 1, 1983.

CONCLUSION

The City of Fayetteville ultimately may be required to expend in excess of one million dollars of taxpayer funds as a result of what is now commonly referred to as the "Spell incident." If so, it is only right that liability be imposed pursuant to a reasoned process which makes clear exactly why, after taking affirmative steps to remedy perceived defects within its police department, the City should be labeled as a municipality which tolerates and/or promotes brutality on the part of one or more of its police officers. Even more important, however, is the impact of the instant case on political subdivisions throughout the country and the desperate need for clear, definitive and understandable guidelines for the imposition of *Monell* liability resulting from an act by one of their employees.[6]

Respectfully submitted,

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[6] *Cf., City of Canton v. Harris*, 56 U.S.L.W. 3048 (U.S. July 28, 1987) (presenting issue of *Monell* liability for injuries resulting from an alleged *de facto* policy of inadequate training).